

(h) Cable Operator's Duty to Inform Subscribers.

The cable operator shall inform subscribers of their right to service connection, its repair or other service, within a four (4) hour period and their remedies for missed appointments by offering the four (4) hour period and the information pertaining to remedies at the time the subscriber calls for service or repair, or by notifying their subscriber by mail three (3) times a year of the service and their remedies. Such mailed notice may be performed by inserting the appropriate information in the subscribers' monthly bills.

Section 41-25 -- 41-30. Reserved.

DIVISION THREE

COMMUNICATIONS, BILLS AND REFUNDS

Section 41-31. Communications to Consumers

The cable operator will provide written information to subscribers in each of the following areas at the time of installation, at any future time upon request, and at least once per year thereafter:

- (a) Products and services offered;
- (b) prices and service options; *channel*
- (c) installation and service policies, (including details of Section 41-24); *app window*
- (d) availability of parental lock-out devices;
- (e) refund policies; *for return*
- (f) description of complaint procedures; *Bill 215-15*
- (g) subscriber privacy rights notice;

- (h) how to use the cable service, including how subscriber and subscribers can connect their video cassette recorders so as to more fully utilize the cable services subscribed to; and
  - (i) information concerning the responsibility of the City of Kalamazoo, including the mailing address and phone number of the City's designee for cable matters.
- (1) The text of the printed notice shall be as follows, unless otherwise authorized by the Commission:

PLEASE READ THIS

The City of Kalamazoo through the Office of the City Cable Administrator, is responsible for monitoring the customer service, system performance, and franchise compliance of your cable company. Toward this end, the City and your cable company work continuously to monitor and improve cable TV customer service in your community.

However, at times you may encounter problems with your cable service that you have been unable to resolve with your cable company. The City Cable Administrator is available to help you with unresolved problems. If this is the case, please call the City Cable Administrator's office at \_\_\_\_\_ weekdays (an answering machine takes messages after business hours), or write to the City Cable Administrator, 241 West South Street, Kalamazoo, Michigan 49007.

However, please contact your cable company FIRST, before calling the City Cable Administrator office about your problem.

PLEASE SAVE FOR FUTURE REFERENCE

- (2) Such notice, in large boldface type, shall also be posted in a conspicuous place in all of the cable operator's offices within the City of Kalamazoo where customer service transactions are conducted.

Section 41-32. Bills and Billing Disputes

1) Bills

- (a) Subscriber's bills from the cable operator will be clear, concise and understandable.
- (b) The cable operator shall annually consult with the City's designee for cable matters regarding accuracy, conciseness and sufficiency of information contained within the standard subscriber billing notice.
- (c) The City shall also review the standard subscriber billing notice for clarity and fairness of representation of information to subscribers which shall also be the subject of the annual consultations noted in subsection (b) above.
- (d) The cable operator shall identify any service bureau or other third party which prepares billing notices.

2) Billing Disputes. If a subscriber has notified the operator in writing that a bill is in dispute:

- (a) operator shall not terminate service pending resolution of the dispute;
- (b) Nor shall the account be turned over or reported to a collection agency, provided that the remaining balance of the bill is current; and
- (c) A bill shall not be considered to be in dispute solely by reason of nonpayment by subscriber.

Section 41-33. Refunds.

- (a) Refund checks will be issued promptly, but no later than the earlier of forty-five (45) days, or the subscriber's next billing cycle following the resolution of the request; and
- (b) If service is terminated, a refund check will be sent no later than forty-five (45) days after the subscriber returns all of the equipment supplied by the cable operator.

Section 41-34. Rate or Channel Changes

Subscribers will be notified a minimum of thirty (30) days in advance of any rate or channel change, provided the change is within the control of the cable operator.

Sections 41-35--41-40. Reserved.

ARTICLE III

RESERVED

Sections 41-41 -- 41-60. Reserved.

ARTICLE IV

RESERVED

Sections 41-61 -- 41-80. Reserved.

ARTICLE V

PENALTIES

Section 41-81. Violations.

- (a) No person, individual, party, partnership, corporation, joint venture, joint stock company, consortium, trust, individual, or other entity functioning as an operator of a cable system ("cable operator") shall violate any of the mandatory provisions of this ordinance;
- (b) Violation of a mandatory provision of this Ordinance shall be a civil infraction punishable by a judgment of

up to, but not exceeding One Hundred Dollars (\$100.00);  
and

- (c) The judgment for each such event involving any one consumer on any one day in regards to any particular section or sub-section of this chapter shall not exceed One Hundred (\$100.00) Dollars;

Section 41-82. Evaluation of Violations.

- (a) The violation of this ordinance by a cable operator, an operator's agents, employees and/or independent contractors employed or retained by the cable operator shall be grounds for evaluating:
  - (1) a cable operator's compliance with an existing Consent Agreement and with applicable law; and
  - (2) the quality of a cable operator's service and whether it has been reasonable in light of community needs; and
  - (3) the technical ability of a cable operator to provide the services, facilities, and equipment as set forth in an operator's proposal for future or renewed cable services; and
  - (4) the reasonableness of an operator's proposal to meet the future cable-related community needs and interests of the residents and cable television consumers of Kalamazoo.
- (b) These evaluations are proper and germane for the City to consider formally when reviewing proposal(s) for renewal of any Consent Agreement to provide cable services within the City of Kalamazoo.


Section 2. Repealer. All former ordinances or parts of ordinances conflicting or inconsistent with the provisions of this ordinance are hereby repealed.

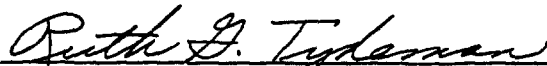
Section 3. Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any Court of competent

jurisdiction, said portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this ordinance.

CERTIFICATE

The foregoing is a true and complete copy of an ordinance adopted by the City Commission of the City of Kalamazoo at a regular meeting held on December 10, 1990. Public notice was given and the meeting was conducted in full compliance with the Open Meetings Act, (PA 267, 1976). Minutes of the meeting will be available as required by the Act, and the ordinance was duly recorded, posted and authenticated by the Mayor and City Clerk as required by the Charter of said City.

  
\_\_\_\_\_  
Edward J. Annen, Mayor

  
\_\_\_\_\_  
Ruth G. Tydeman, City Clerk

§§.

City Clerk

of said City, do hereby certify that I have compared the attached copy of Ordinance No. 1503

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said City, this 19th day of

December 19 90

City Clerk.

# INTER-OFFICE **MEMO**

RECEIVED

To: Robert H. Cinabro, City Attorney  
From: Matt O. Morris, Assistant City Attorney  
Date: August 29, 1990  
Subject: Legal Opinion Regarding Proposed "Cable Television Consumer Protection Policy" Ordinance for the City of Kalamazoo

JAN 11 1993

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## BACKGROUND

The City (Commissioners, Administration, Cable Administrator and other offices) has received numerous complaints from cable subscribers regarding adequate telephone response time; missed installation and service appointments by Cablevision staff; and other complaints pertaining to cable television service in the City of Kalamazoo. These complaints led to a public hearing held in June, 1990. One result of these complaints and the public hearing was development of a Cable Television Consumer Protection Ordinance.

## CONSENT AGREEMENT

On April 6, 1981 the City of Kalamazoo entered into a Consent Agreement with Fetzer Broadcasting Company regarding cable television. This Consent Agreement, (which is not a franchise), "shall not preclude the City from exercising any of its police powers," Section 5(c)(1). Further, Section 22(M)(1) identifies the cable operator's obligation to "promulgate [and] adhere to a preventive maintenance policy directed toward maximizing the reliability (mean-time-between-malfunctions) and maintainability (mean-time-to-repair) of the Cable System with respect to its delivery of service to subscribers . . . ." The service department (§22(M)(2)) and the obligation "to remedy loss of service attributable to the Cable System" (§22(M)(3)) all underscore the operator's obligation to maintain the system in general and to respond to service complaints.

This obligation continued when Cablevision purchased Fetzer's cable interests in 1986. Cablevision's 1985 "Assumption Agreement" with the City specifically provides that "Cablevision shall assume and be bound by all of the provisions, terms and conditions of the Consent Agreement and all applicable federal, state and local laws" [Section 1]. The Assumption Agreement [§2(g)] reaffirms the necessity of the subscriber complaint policy [Consent Agreement §26(A)] and the monthly report of service calls to the City [Assumption Agreement, §2 (e), pursuant to §16(d) of the Consent Agreement].

Thus Cablevision is already under obligation to maintain the cable system in general, to respond to service complaints, and be bound by all of the provisions, terms and conditions of applicable federal and local laws.



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### 1984 FEDERAL CABLE ACT

The "Cable Communications Policy Act of 1984" articulated standards and roles for municipalities and cable operators. Two major sections of the Cable Act involved Consumer Protection [§632, codified as 47 USC §552], and Renewal procedures, [§626; 47 USC §546]. In addition, the police power was preserved from federal preemption "to the extent consistent with the express provisions of the Cable Act." [Section 636; 47 USC §556(a)]

### CONSUMER PROTECTION PROVISIONS IN FEDERAL ACT

The Cable Act specifically provides that "[n]othing in this title shall be construed to prohibit any state or franchising authority from enacting or enforcing any consumer protection law, to the extent not inconsistent with this title [1984 Cable Act is a new title added to the [Broadcast] Communications Act of 1934]" [47 USC §632(c); see H.R. Rep. No. 98-934, 98th Cong., 2d Sess, 79].

Further, the Committee Report stated:

In general, customer service means the direct business relation between a cable operator and a subscriber. Customer service requirements include requirements related to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints; the location of the cable operator's consumer service offices; and the provision to customers (or potential customers) of information on billing of services. [Id., (emphasis added)].

Proposed ordinance Section 41-34 addresses "retiering", but does this in the context of "consumer protection" (bait and switch, change the mix) and "equivalent functions", not specific programs or services. Similarly, the discussion about rates [§41-34(d)] does not violate the provisions of Section 632(e) [47 USC §543(e)].

### RENEWAL

The Committee Report notes "a cable operator and a franchising authority may negotiate the renewal of a franchise independently of" Section 626 ("Renewal") [Report, at 72; 47 USC §546(h).] The Act provides a detailed procedure if a community is considering non-renewal, or going to another provider, 47 USC §546.

Key to this procedure is provision of "notice" to the cable operator and "the opportunity to cure," 47 USC §546(d). Further, any decision to deny must be "supported" by a preponderance of the evidence, based

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on the record [including transcript] of the proceeding," Id., at 47 USC §546(e)(2)(B). This administrative proceeding, with prompt public notice, is limited to considering four points, included in the Ordinance as Section 41-82(a)(1)-(4). These four concerns are whether:

"(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service including signal quality, response to consumer complaints and billing practices, but without regard to the mix, quality or level of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests. [47 USC §546(c)(1) (emphasis added).]

Because this process must begin in the first six month period beginning three years before the expiration of the franchise [Triad CATV, Inc. v City of Hastings, No. L89-30090 CA (W.D. Mich. Dec. 21, 1989), on appeal, No. 90-1082 (6th Cir. filed Jan. 3, 1990)] it is well to be prepared in advance. Since the current Consent Agreement expires in 1996 (subject to a five year mutual option to renew), the Cable Act, if it did apply, would require the City to begin proceedings in April 1993.

The municipal obligation would then be to 1) give notice, 2) the opportunity to cure, and 3) to document sufficiently in a proceeding record the justification for non-renewal due to "operator's service including signal quality, response to consumer complaints, and billing practices," 47 USC §546(c)(1)(B) [Emphasis added.]

Section 41-82 of this ordinance, by articulating the language and standards of Section 626 [47 U.S.C. §546(c)(1)], would help prepare and preserve these option(s) for the City and its citizens, prior to April 1993.

#### COURT DECISIONS

This proposed ordinance is not an attempt to proscribe conduct protected by the First Amendment, Chicago Cable Communications v

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Chicago Cable Comm'n, 879 F2d 1540, 1547-1551 (7th Cir. 1989), applying United States v O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 20 L Ed 2d 672 (1968); Omega Satellite Products Co. v City of Indianapolis, 694 F2d 119, 127-129 (7th Cir. 1982); Community Communications Co. v City of Boulder, 660 F2d 1370, 1377-80 (10th Cir. 1981), cert. dism'd, 456 US 1001, 102 S. Ct. 2287, 73 L Ed 2d 1296 (1982); See Carlson v Village of Union City, 601 F Supp 801, 809--812 (W.D. Mich. 1985); See also City of Los Angeles v Preferred Communications, 476 US 488, 494-95, 106 S. Ct. 2034, 2038, 90 L Ed 480 (1986); Compare Century Communications Corp. v. FCC, 835 F 2d 292 (D.C. Cir. 1987), cert denied, Office of Communications v FCC, 108 S Ct 2014 (1988); Quincy Cable TV v FCC, 768 F 2d 1434 (D.C. Cir. 1985).

Rather, the proposed ordinance is a customer service requirement, and a consumer protection law. These are allowed by 47 USC §552, which was recently discussed by the Michigan Court of Appeals, Comcast Cablevision v City of Sterling Heights, 178 Mich App 117, 443 NW 2d 440, 443 (1989); See H.R. Rep. No. 98-934; 98th Cong. 2d Sess. 79, reprinted in 1984 U.S. Code Cong. & Admin. News 4655, 4716. The Sterling Heights court stated the "Cable Act did not affect existing franchise agreements, unless they were inconsistent with the Act. 47 USC §556, 557," 178 Mich App at 126, 443 NW 2d at 443.

Similarly, "[u]nder the Act, franchising authorities have broader powers to enforce specific programming provisions in franchises already in existence . . . ." Jones Intercable v City of Stevens Point, 729 F Supp 642, 647 (W.D. Wisc. 1990). And since there is a de facto natural monopoly of cable television service in Kalamazoo, See Central Telecommunications, Inc. v TCI Cablevision, Inc., 800 F 2d 71, 717, 726 (8th Cir. 1986), it is appropriate for a municipality to promulgate appropriate cable regulations, Chicago Cable, 879 F 2d at 1541-1551.

#### Powers of Michigan Charter Cities

To the degree permitted and/or authorized by the 1984 Cable Act, municipal bodies may regulate cable television services and operators. This includes new franchises, pre-Act consent agreements, consumer protection standards and ordinances, etc. However, in a system of dual federalism, the degree of discretion granted cities is subject to the degree of autonomy or restriction imposed by state laws or constitutions.

In Michigan, a charter city or village has the "power to adopt resolutions and ordinances relating to its municipal concerns," Mich. Const. (1963), Art. vii, §22. The current language in the Nesbitt-Romney Constitution of 1963

"is a revision of Sec. 21, Article VIII [of the 1980 Constitution] reflecting Michigan's successful experience

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with home rule. The new language is a more powerful statement of municipal powers, giving home rule cities and villages full power over their own property and government, subject to this [1963] constitution and law." [Mich. Const. (1963), Art vii, §22 (Convention Comment).]

An early home rule case is Cady v City of Detroit, 289 Mich 499, 507-514 (1939) (Ordinance passed by charter city presumed constitutional same as statute passed by legislature, with presumptions in favor of constitutionality); People v Sell, 310 Mich 305, 311-316 (1945) (reiterating Cady and stating the "police power is "sufficiently comprehensive to embrace new subjects as exigencies arise and changing conditions require"); Weber v Wayne Circuit Judge, 2 Mich App 140, 149-150 (1966) ("Michigan has long recognized that local conditions and interests demand different regulations and that violation of such regulations which relate to acts and omissions that are not embraced in the general criminal legislation of the State may be treated differently than are violations of the general laws, In re Cox (1902), 129 Mich 635, 636." [Emphasis added ] and "some ordinance violations may not be crimes"); and People v Krezen, 427 Mich 481, 6940697 (1981) (plurality opinion by Boyle, J.) (Reviewing Mich. Const. Art. vii, Section 22 the Convention Comment and MCL 117.3(j)/MSA 4.2073(j), and a Grand Rapids police ordinance to impound cars; concluding that absent circumvention of the constitution or a pre-eminent state [or federal] statute, "this court can not hinder the local government's exercise of the police power").

#### CONCLUSION

The proposed "Cable Television Consumer Protection Policy" ordinance is designed to exercise the City's police powers reserved in the 1981 Consent Agreement and 1986 Assumption Agreement. Further this exercise of police power is consistent with the consumer protection and subscriber service provisions of both Agreements.

The 1984 Cable Act (to the degree it applies to the City of Kalamazoo situation) preserves the police power for local governments wishing to reasonably regulate cable television in their communities. Municipal "consumer protection" and "customer service" regulation are specifically authorized in the 1984 Act, 47 USC §632, and are consistent with legislative intent, H.R. Rep. No. 98-934 at 79. Most of the definitions in the proposed ordinance are drawn from the Act, and some from the House Committee Report.

Consumer protection is a legitimate factor for municipal consideration in any renewal of the Consent Agreement, or the issuance/renewal of a cable franchise. The proposed ordinance articulates some customer service standards for possible review and consideration during renewal

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proceedings. Thus the City could provide notice of publicly-articulated deficiencies in customer service and consumer protection, and allow the cable operator an opportunity to cure the situation.

Although cable jurisprudence is somewhat sketchy, with significant gaps, and inappropriate choice of print-media standards in California-generated cases, germane Midwestern cable decisions involving the Seventh, Eighth and Tenth Circuits, the U.S. District Court for the Western District of Michigan, and the Michigan Court of Appeals all tend to support the position taken in the proposed Kalamazoo Cable ordinance.

#### OPINION

As a result, it is the opinion of this office that the Consumer Protection ordinance, as drafted, intended and focused seeks to function within the bounds of the Consent Agreement, Assumption Agreement, the 1984 Cable Act, and the relevant and germane court decisions applicable to this topic. It is further the opinion of this Office that the proposed ordinance is legal under the jurisprudence of the State of Michigan, and the relevant United States Courts with jurisdiction in the midwest.

MOM:mp

THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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CABLEVISION OF MICHIGAN, INC. : Docket No. 4:90-CV-170  
a Michigan Corporation. :  
Plaintiffs. :  
VS. : DECEMBER 20, 1990.  
CITY OF KALAMAZOO, : Kalamazoo, Michigan.  
a Municipal Corporation, :  
Defendant. :  
-----

RULING, TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION

Before: HONORABLE RICHARD A. ENSLEN,  
United States District Judge.

PRESENT FOR:

PLAINTIFF CABLEVISION OF MICHIGAN, INC.: Kreis, Enderle, Callander & Huggins  
By: DOUGLAS L. CALLANDER, ESQ.  
ALAN G. ENDERLE, ESQ.  
800 Comerica Building  
Kalamazoo, Michigan 49007

DEFENDANT, the CITY of Office of the City Attorney  
KALAMAZOO: by: ROBERT H. CINABRO, ESQ.  
City Attorney, and  
MATTHEW O. MORRIS, ESQ.  
Assistant City Attorney  
241 W. South Street,  
Kalamazoo, Michigan 49007-4796

(Also present as identified: Donald P. Curley with  
Plaintiff; and Joan Burke, with Defendant City.)

Official Ct. Reporter: Jarratt W. Martin,  
U.S. District Ct., P.O. Bx 81, Court Station,  
Kalamazoo, Mi. 49005-0081 Ph. (344-5235)

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1 DECEMBER 20, 1990 (6:15 p.m.)

KALAMAZOO, MICHIGAN.

2 THE COURT: An interesting discussion. Cablevision  
3 comes to this court with a complaint yesterday seeking a  
4 temporary restraining order, a preliminary injunction, and  
5 finally a permanent injunction, declaratory judgment, and so  
6 forth, and, currently, seeking to enjoin the, quote,  
7 "operation enforcement and implementation" of Kalamazoo City  
8 Ordinance Number 1503 promulgated by the city commission on  
9 December 10th, 1990.

10 Pursuant to the city charter, paragraph 13.  
11 the ordinance should go into effect from and after ten days  
12 from the date of the passage; and the city now states, and  
13 there is a stipulation, that it would go into effect Friday,  
14 December 21st, 1990, and not on December 20th as originally  
15 Cablevision had alleged.

16 Cablevision argues that the ordinance  
17 breaches its agreement with the city, secondly, is in  
18 violation of the Cable Communications Act, better known to me  
19 at least at 47 U.S.C. Section 521, et sec., and, thirdly, is  
20 a violation of the Contract Clause, Article I, Section 10 of  
21 the United States Constitution, thus constituting a taking of  
22 property without due process of law; and seeks relief under  
23 Section 1983 because there is a constitutional provision that  
24 has been alleged or two constitutional provisions alleged.

25 The city responds that the ordinance is a

1 consumer protection ordinance that is enacted specifically  
2 under its police powers explicitly reserved by the agreement  
3 and specifically authorized by 47 U.S.C. Section 552(c) of  
4 1938.

5 Kalamazoo City and Cablevision entered,  
6 sort of entered a consent agreement -- that is not true.  
7 What happened is the city of Kalamazoo and Fetzer  
8 Broadcasting Company entered into a consent agreement  
9 regarding cable services, and there was an assumption by  
10 Cablevision, the plaintiff here, of that agreement. The  
11 original agreement I believe was in 1981, I think in April.  
12 Cablevision then purchased Fetzer's interests and entered  
13 into this assumption agreement pursuant to which it assumed  
14 the rights and the responsibilities of Fetzer.

15 Section 5(C)(1) of the agreement explicitly  
16 provides that it, quote, "shall not preclude the city from  
17 exercising any of its police powers."

18 In June of 1990, the city had a public  
19 hearing at which allegedly 45 people attended. There is an  
20 argument about how many people attended and whether they were  
21 commissioners or citizens or city attorneys or whatever; and  
22 the 45 number comes from Joan Burke's affidavit, page 3.

23 Cablevision states, and I haven't heard  
24 anybody dispute it, that 19 people -- however many might have  
25 been in attendance -- spoke at the hearing. As a result of



1 the hearing, the city of Kalamazoo and plaintiff attempted to  
2 reach an agreement on revised customer service standards; and  
3 the two sides could not reach an agreement, hence, the  
4 ordinance and the argument before me.

5 The plaintiff, in short, argues a breach of  
6 contract, the unilateral breach of contract, a violation of  
7 the Act, and violation of the Article I, Section 10  
8 impairment of contract clause of the Constitution, and a  
9 taking without due process in order to justify its complaint  
10 and its immediate relief sought.

11 Rule 65(b) provides in relevant part that  
12 this a temporary restraining order can be issued without  
13 notice to the opposing party only if, one, it clearly appears  
14 from specific facts that immediate and irreparable injury  
15 will result before the adverse party can be heard and, two,  
16 the applicant certifies to the court in writing the efforts  
17 made to give the notice and the reasons supporting the claim  
18 that notice cannot be required or should not be required.  
19 That is not the situation here.

20 Let me state that a different way. If that  
21 were the situation, if the plaintiff sought a temporary  
22 restraining order without notice to the city, then the  
23 plaintiff would only have to establish irreparable injury,  
24 and the Court need look at nothing else; but if the Court is  
25 considering a matter in which the other side did get notice,

1 as in this case, and considers it under the preliminary  
2 injunction standard, then the court has to add the other  
3 three well-known factors before granting a preliminary  
4 injunction.

5 I asked the lawyers at the outset if they  
6 wanted me to consider this matter being heard here for  
7 preliminary injunctive purposes, and I got confused answers  
8 from both, which is sort of a lawyer's way to keep his foot  
9 in the door. But the court believes at this stage at least  
10 the court should apply all four, considering the relief  
11 sought on the basis of the information that I have received  
12 both as to a temporary restraining order and as to a  
13 preliminary injunction.

14 Rule 65(b) makes it clear that the  
15 potentially drastic consequences of a restraining order  
16 mandate a careful consideration by a trial court faced with  
17 such a request. The issuance of the order is according to  
18 all law that I know within the discretion of the trial court.  
19 A court deciding whether to grant a temporary restraining  
20 order should be assured that the movant has produced  
21 compelling evidence of irreparable and imminent injury, and  
22 that the movant has exhausted reasonable efforts to give the  
23 adverse party notice -- not required here because the  
24 plaintiff did give the adverse party notice, and the adverse  
25 party responded immediately.

1                   The court may also, and in this case should  
2 in my opinion, consider other factors, including the  
3 likelihood of success on the merits. the harm to the  
4 nonmoving party, and the public interest -- for the reasons  
5 that I have cited before -- because I believe that I have in  
6 front of me everything that I am going to have on the day  
7 before the ordinance passes to decide whether or not I should  
8 or should not grant a temporary restraining order and a  
9 preliminary injunction.

10                   While there may be no set definition of  
11 irreparable injury, there are characteristics which aid me in  
12 determining whether irreparable injury exists. Quote. "The  
13 moving party must demonstrate a noncompensable injury, for  
14 which there is no legal measure of damages, or none that can  
15 be determined with a sufficient degree of certainty. The  
16 injury must be certain and it must be great. It must be  
17 actual. It must not be merely theoretical."

18                   That is a quote with a lot of ellipsis from  
19 Merrill, Lynch, Pierce, Fenner & Smith vs. E.F. Hutton and  
20 it is found at 403 F. Supp. 336. The quote comes from 343.  
21 That is from the Eastern District of Michigan in 1985 with  
22 numerous citations, all of which I omit.

23                   As far as the Sixth Circuit is concerned.  
24 see Detroit Newspaper Publishers Association vs. Detroit  
25 Typographical Union No. 18, 471 Fed. 2nd 872, 877 from the

1 Sixth Circuit in 1972, holding, as I understand, that the  
2 newspaper publishers' mere allegations of a member's loss of  
3 confidence in a union can never be irreparable harm; and  
4 showing that a union is in danger of losing bargaining  
5 representative status, or suffering loss of membership, may  
6 however constitute irreparable harm.

7 A definition of irreparable injury is also  
8 cited in this circuit, in this district, in City of Benton  
9 Harbor vs. Richardson, 429 F.Supp. 1096 in 1977. The motion  
10 for temporary restraining order can be viewed as a motion for  
11 preliminary injunction if the opposing party is given notice  
12 and is given an opportunity to be heard. Here as I have said  
13 now for the third time, the opposing party has been given  
14 notice, and had an opportunity to be heard and in fact has  
15 been heard.

16 A preliminary injunction is also appropriate  
17 when necessary to maintain the status quo pending the outcome  
18 of proceedings. See University of Texas vs. Camenisch,  
19 451 U. S. 390, 395 in 1981. Whether to issue a preliminary  
20 injunction again should be, and I understand is, within the  
21 discretion of the district court, and is reviewed by the  
22 circuit court for abuse of discretion. So says the circuit  
23 court of my circuit in Forry vs. Neundorfer, 837 Fed. 2nd,  
24 259 at 262 in 1988. The district court findings of fact  
25 according to Forry are upheld unless clearly erroneous.

1 In determining whether to issue a  
2 preliminary injunction, I now leave the simple standard of  
3 likely irreparable harm, to the four standards of likelihood  
4 of success on the merits, the irreparable injury which I have  
5 also previously spoken about, the possibility of substantial  
6 harm to others if the injunction is issued, and whether the  
7 public interest would be served by issuing a preliminary  
8 injunction.

9 See Christian Schmidt Brewing vs. Heilman  
10 Brewing, 753 Fed. 2nd, 1354, at 1356 from the Sixth Circuit.  
11 certiorari denied at 469 U. S. 1200. The Sixth Circuit  
12 cautions over and over again that these factors should not be  
13 viewed as prerequisites to relief but rather as balancing  
14 factors. I don't know how many times the court said that,  
15 but it said it in in re Delorean Motor Company, a well-known  
16 case, and in 1985, at 775 Fed. 2nd 1233.

17 With regard to the question of irreparable  
18 harm, the one that is the only standard that I have to look  
19 at on the T/R/O, the plaintiff argues that -- actually, I  
20 didn't understand the plaintiff's argument until today when  
21 he argued in the courtroom. When I read the briefs, my  
22 problem with his request was that everything that he cited as  
23 a potential damage was readily ascertainable in dollars.  
24 Those things would include hiring additional staff, buying  
25 additional equipment, paying sanctions to the city for

1 violation of the new ordinance, and perhaps others that I  
2 haven't thought of; but each of these is clearly easy to  
3 ascertain in dollar damages and would never provide the basis  
4 for irreparable harm.

5                   This morning, this afternoon, rather, this  
6 evening, whatever day this is, the hat out of the box as I  
7 call it -- I have lost my note. I have lost a page. There  
8 is a single sheet that must have torn off on my desk. Would  
9 you get that for me? We will take a moment while I drink  
10 some water.

11                   I understood Mr. Callander to say that.  
12 almost the first thing that he said when I asked him about  
13 irreparable harm, was that the franchise of his client could  
14 be forfeited and its assets seized. That is the language of  
15 course, that kind of language; that kind of statement is the  
16 stuff of which irreparable harm is made and not the earlier  
17 things that I talked about, about spending money for  
18 equipment, secretaries, or fines.

19                   As he developed his argument, he called my  
20 attention to Section 41-82 of the new ordinance which is  
21 entitled "Evaluation of Violations," and that was also argued  
22 by the city of Kalamazoo; and the argument of the plaintiff  
23 is that he has an irreparable injury under 41-82 even though  
24 he will not have to comply with anything before 1993 at the  
25 earliest and 1996 at the latest with regard to its renewal

1 application.

2           The city argued, and I think not only argued  
3 but rather persuasively bound its own client, by saying there  
4 is nothing that it can do under the ordinance to terminate  
5 the current franchise agreement -- causing me to look back to  
6 the contract itself, or the franchise agreement which I  
7 prefer to call it; and there is of course in the agreement  
8 itself a termination clause. The termination clause found on  
9 page 31 of the agreement, not argued today by any of the  
10 lawyers, permits the city commission to terminate the  
11 agreement if there is a material breach of any provision of  
12 the contract.

13           I suppose a question one should ask, but I  
14 answer it: Is there any possibility that section 41-82 of  
15 the ordinance grants the city a greater power under the  
16 termination provisions of the contract than it already had.  
17 and I answer the question, if I stated it correctly, with an  
18 absolutely no. There is no possible way that one can  
19 interpret Section 41-82 of the new ordinance as providing the  
20 substance of a material breach because by its own language it  
21 relates only to renewal of consent agreements.

22           How could one argue that the city had a  
23 stronger termination arrangement under its previous contract.  
24 its only contract with Fetzer -- and then the current  
25 plaintiff -- by 41-82? And the answer is it cannot. Section

1 41-82 I find, as a matter of law, relates to renewal only.  
2 That is clear by the language of 41-82, and it is also clear  
3 by the section of the act which Mr. Morris read to me and  
4 which I reread. It does not provide causal grounds for a  
5 city to claim a material breach of the agreement.

6 Therefore, I do not see any way that the  
7 franchise can be forfeited and the assets seized as  
8 originally argued; and I, therefore, do not find that  
9 Cablevision has met its burden of demonstrating to me the  
10 irreparable harm.

11 The plaintiff's support for irreparable harm  
12 are the statements that, this is in the brief, quote: "There  
13 is no legal measure of damage which would compensate  
14 plaintiff," and, quote, "the injury is contractual,  
15 constitutional and economic." Those quotes I lifted from the  
16 plaintiff's brief at page 4.

17 Cablevision in its brief offers no further  
18 discussion of and no laws for defining irreparable injury.  
19 Assuming that the ordinance would constitute a violation of  
20 the contract clause, which I will address later, or taking of  
21 property without due process, a 14th Amendment claim, this  
22 Court can find no case law determining that either of the  
23 alleged constitutional violations constitute irreparable  
24 injury for the purposes of imposing a court ordered  
25 injunction.



1           A constitutional violation itself is not  
2 necessarily an injury that money cannot fully compensate.  
3 However, the main thrust of Cablevision's complaint is that  
4 the ordinance will impose huge financial obligations on it  
5 beyond those required under the agreement. That is not the  
6 stuff by which this court or any other court can find  
7 irreparable injury.

8           Moreover, 41-82 dealing with renewal of the  
9 franchise, or what it calls a consent agreement, is  
10 speculative and in futuro; that is to say, that you don't  
11 grant injunctions based upon irreparable injury because some  
12 day in the future some argument might be made that the  
13 franchisee is not in compliance with the ordinance or with  
14 its own agreement. That may be a good argument for  
15 declaratory judgment, and it may even be a good argument for  
16 a permanent injunction. It is no argument at all for a  
17 preliminary injunction or for a temporary restraining order.

18           In short, in summarizing the reasons that I  
19 think there is no irreparable harm shown is, first, that  
20 41-82 deals only with renewal of consent agreements; and,  
21 secondly, that it is by its own language it is speculative.  
22 remembering that the language was drafted right out of the  
23 statute, lifted out of the statute basically.

24           The Court would have satisfied itself at  
25 that stage were this is a motion for a temporary restraining